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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



JAN 13 2003

File: LIN-02-025-53578 Office: Nebraska Service Center

Date:

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

PUBLIC COPY

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a farm growing raspberries and blueberries. It has seven permanent employees and up to forty seasonal employees with a stated gross annual income of \$464,414. The petitioner seeks to employ the beneficiary as an accountant for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a brief and additional documentation.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

The director concluded that the petitioner had failed to demonstrate that the proffered position could only be successfully performed by an individual who possessed a baccalaureate or higher degree in a specific specialty. On appeal, counsel argues that the proffered position is a specialty occupation because it requires a bachelor's level degree in accounting or a related field. Counsel asserts that the Service ignored expert testimony, published sources of authority, and case law in determining that the offered position was not a specialty occupation.

Counsel's statements on appeal are not persuasive. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In a separate letter which accompanied the initial I-129 petition, the petitioner described the duties of the offered position as follows:

- * Analyze the company's financial performance and prepare related reports.

- * Coordinate budget preparation process and review performance against budget during the year.
- * Develop effective standard and activity-based costing systems and production models.
- * Analyze and project future financial requirements.
- * Produce accurate and timely financial information to ensure continued fiscal responsibility.
- * Manage all accounting and payroll functions.
- * Maintain financial and corporate records.
- * Perform financial reporting including special purpose financial reports.
- * Produce of [sic] all financial information required for year-end processes.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
3. The employer normally requires a degree or its equivalent for the position; or
4. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

On appeal, counsel asserts that the Department of Labor has determined in its Dictionary of Occupational Titles (DOT) that the position of accountant is a specialty occupation. In support of his assertion, counsel submits a photocopy of the section of the DOT

that describes the duties of an accountant. However, a reference in DOT, standing alone, is not enough to establish that an occupation is a specialty occupation. The DOT classification system and its categorization of an occupation as "professional and kindred" are not directly related to membership in a profession or specialty occupation as defined in immigration law. In the DOT listing of occupations, any given subject area within the professions contains nonprofessional work, as well as work within the professions.

The latest edition of the DOT does not give information about the educational and other requirements for the different occupations. This type of information is currently furnished by the Department of Labor in the various editions of the Occupational Outlook Handbook (Handbook). The latter publication is given considerable weight (certainly much more than the DOT) in determining whether an occupation is within the professions. This is because it provides specific and detailed information regarding the educational and other requirements for occupations.

In its Handbook, 2002-2003 edition, at pages 21-24, the Department of Labor (DOL) describes the job of a management accountant as follows:

Management accountants - also called industrial, corporate or private accountants - record and analyze the financial information for the companies for which they work. Other responsibilities include budgeting, performance evaluation, cost management, and asset management. Usually, management accountants are part of executive teams involved in strategic planning or new-product development. They analyze and interpret the financial information that corporate executives need to make sound business decisions. They also prepare financial reports for non-management groups, including stockholders, creditors, regulatory agencies, and tax authorities. Within accounting departments, they may work in areas including financial analysis, planning and budgeting, and cost accounting.

The Service does not contest counsel's statement that a baccalaureate degree in accounting is a minimum requirement for employment as an accountant. However, the record does not contain sufficient documentation to show that the proffered position is indeed that of an accountant. While the record contains a letter signed by [REDACTED] who concludes that the offered job is that of an accountant [REDACTED] conclusion is based on the petitioner's description of the position. As counsel himself notes, the petitioner's description of the duties of the proffered position paraphrases portions of the description of the duties of an accountant as set forth in the Handbook. This description is a generic description of the types of duties typically performed by

accountants. Neither counsel nor the petitioner has made any effort to specify the day-to-day duties the holder of the offered position will actually perform or the percentage of time to be allocated to each of these duties on a daily basis.

The record reflects that the petitioner, a berry farm, employs seven permanent and up to forty seasonal employees, and has a stated gross annual income of \$464,414. The business in which the beneficiary is to be employed does not require the services of a management accountant who is a part of, or involved in, an executive decision-making team. Furthermore, there is no evidence that the proffered position includes complex or advanced accounting duties such as the preparation of detailed financial reports for outside agencies or corporate stockholders, or that the position requires an individual with a knowledge of sophisticated accounting techniques normally associated with the duties of a corporate accountant. For example, the petitioner states that the beneficiary will analyze the company's current financial performance and project future financial requirements. However, the record contains a copy of the petitioner's federal tax return for the year 2000, which has been prepared by a corporate accounting firm. Neither the petitioner nor counsel has provided any explanation as to why this corporate accounting firm would not reasonably be expected to have performed and continue to perform any of the complex or advanced accounting functions or duties needed by the petitioner.

The petitioner's relatively small size and scope, while not dispositive, strongly suggest that the majority of the beneficiary's activities will combine the duties that a bookkeeping, accounting, or auditing clerk would execute in a small business establishment. In contrast to the description of an accountant, the DOL describes the positions of a bookkeeping, accounting, and auditing clerk in its Handbook at pages 390-392, as follows:

In small establishments, *bookkeeping clerks* handle all financial transactions and recordkeeping. They record all transactions, post debits and credits, and prepare reports for supervisors and managers....

More advanced accounting clerks may total, balance, and reconcile billing vouchers; ensure completeness and accuracy of data on accounts; and code documents, according to company procedures. They post transactions in journals and on computer files and update these files when needed....

Auditing clerks verify records of transactions posted by other workers. They check figures, postings, and documents for correct entry, mathematical accuracy, and proper codes.

The offered job's duties relate more closely to the duties of the positions of bookkeeping, accounting, and auditing clerk than to those of a corporate accountant. The petitioner indicates that the beneficiary will manage payroll functions and maintain financial and corporate records. Bookkeeping, updating payroll, auditing payroll and financial transactions, and the compilation of routine accounting reports are not duties normally associated with a corporate accountant. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Counsel cites the holding reached in Matter of Katigbak, 14 I. & N. Dec. 45 (BIA 1967), to support his argument that the position of accountant is a specialty occupation because it is professional in nature. However, this decision dealt with membership in the professions, not membership in a specialty occupation. While these terms are similar, they are not synonymous. The term "specialty occupation" is specifically defined in section 214(i) of the Act. That statutory language effectively supersedes the cited decision.

The petitioner has failed to submit any evidence to demonstrate that the degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner has failed to establish that it has, in the past, required the services of individuals with baccalaureate or higher degrees for the offered position.

Counsel's assertion that the proffered position is a specialty occupation because its duties are so specialized and complex cannot be accepted because no documentary evidence has been submitted that would tend to corroborate this assertion. As discussed previously, the description of the duties of the offered job paraphrases the general description for the duties of an accountant position contained in the Handbook, without specifying the day-to-day duties the holder of the offered position will actually perform or the percentage of time to be allocated to each of these duties on a daily basis. It was held in Matter of Obaiqbena, 19 I. & N. Dec. 533, 534 (BIA 1988) and Matter of Ramirez-Sanchez, 17 I. & N. Dec. 503 (BIA 1980), that the assertions of counsel do not constitute evidence. Consequently, it cannot be concluded that the petitioner has shown that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. The job fits the descriptions of a bookkeeping, accounting, and auditing clerk, rather than an accountant. According to the DOL, the usual requirement for a bookkeeping, accounting or auditing clerk is a

high school diploma or its equivalent. A higher level of training is favored but not required, and such training is available in community colleges or schools of business. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.